

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

UNITED SERVICES AUTOMOBILE  
ASSOCIATION d/b/a USAA,

Plaintiff,

v.

NEW DAY FINANCIAL, LLC d/b/a  
NEWDAY USA,

Defendant.

Civil Action No. 5:17-cv-00759

JURY TRIAL DEMANDED

**USAA’S COMPLAINT FOR COPYRIGHT INFRINGEMENT,  
TRADEMARK INFRINGEMENT, AND UNFAIR COMPETITION**

Plaintiff United Services Automobile Association d/b/a USAA, by and through its attorneys, brings this complaint against New Day Financial, LLC d/b/a NewDay USA (“NewDay USA”). In support thereof, USAA alleges the following.

**NATURE OF THE ACTION**

1. This is a case of willful copyright infringement, trademark infringement, and unfair competition by NewDay USA. NewDay USA, a nonbank mortgage lender, changed its business model to compete with USAA. USAA is one of America’s leading insurance and financial service providers, and caters its services to military personnel, veterans, and their families. NewDay USA appropriated USAA’s brand identity and copied USAA’s national advertising campaigns to capitalize on USAA’s long-standing reputation, and to deceive the public into believing that NewDay USA is just like USAA, when it is not. NewDay USA’s efforts to ride on the coattails of USAA have not gone unnoticed. Its copying of USAA is so transparent, that NewDay USA’s ad campaign was described as a “clone” of USAA’s.

2. The accuracy of the idiom “a picture is worth a thousand words” is made clear by the following comparison of still excerpts from a USAA television commercial on the left, and a NewDay USA television commercial on the right, the similarities of which—as a result of New Day USA’s copying—are immediately obvious and striking:

**USAA**



**NewDay USA**



3. Along with its copying of USAA’s print, digital, and television ads, NewDay USA used USAA’s twenty-year-old tagline: WE KNOW WHAT IT MEANS TO SERVE, by prominently featuring on its website and in its advertisements a virtually identical tagline: WE UNDERSTAND WHAT IT MEANS TO SERVE, as well as highly similar variations thereof.

4. As detailed below, NewDay USA’s blatant and willful infringement have harmed, and will continue to harm, the consumers seeking USAA’s services, USAA, USAA’s high-quality reputation, and the substantial goodwill USAA has developed over the last 95 years.

**THE PARTIES**

5. Plaintiff USAA is a Texas reciprocal inter-insurance exchange that is an unincorporated association. USAA’s principal place of business is at 9800 Fredericksburg Road, San Antonio, TX 78288.

<sup>1</sup> Compare “Thank You 4,” available at [http://players.brightcove.net/2546882112001/default\\_index.html?videoId=5423181152001](http://players.brightcove.net/2546882112001/default_index.html?videoId=5423181152001), at 0:20 with “One of Us,” available at [https://www.ispot.tv/ad/Aom\\_/new-day-usa-one-of-us](https://www.ispot.tv/ad/Aom_/new-day-usa-one-of-us) at 0:11.

6. Upon information and belief, Defendant NewDay USA is a limited liability company formed and existing under the laws of the State of Delaware with its principal place of business at 8160 Maple Lawn Boulevard, Suite 300, Fulton, MD 20759. NewDay USA may be served through its registered agent for service of process, Registered Agent Solutions, Inc. at 1701 Directors Blvd., Suite 300, Austin, Texas 78744 and at 1679 S. Dupont Hwy, Suite 100, Dover, Delaware 19901.

### **JURISDICTION AND VENUE**

7. This is an action for copyright infringement arising under 17 U.S.C. § 101 *et seq.*, trademark infringement under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and trademark infringement under the common law of the State of Texas.

8. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 (actions arising under the Lanham Act), 28 U.S.C. § 1331 (actions arising under the laws of the United States), 28 U.S.C. § 1332(a) (diversity of citizenship between the parties), § 1338(a) (actions arising under an Act of Congress relating to copyrights and trademarks), and § 1367(a) (supplemental jurisdiction).

9. This Court has personal jurisdiction over NewDay USA because it is a Texas Registered Mortgage Banker (#1043) with the Texas Department of Savings and Mortgage Lending and is authorized to conduct business in the State of Texas. Personal jurisdiction is also proper in this district because a substantial part of the events giving rise to the claims alleged herein arose in this judicial district. Upon information and belief, NewDay USA distributes and publicly displays the infringing commercials complained of herein in this District, as well as other districts within the State of Texas.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c) and § 1400(a) because a substantial part of the events giving rise to Plaintiff's claims alleged herein

occurred in this district and the Defendant is subject to personal jurisdiction in this district.

## **FACTS**

### **USAA's Longstanding High-Quality Reputation as a Military Family Provider**

11. USAA was founded in 1922 in San Antonio, Texas, when a group of 25 military officers, deemed “high risk” individuals to insure, gathered to discuss their difficulties in obtaining auto insurance. From those humble beginnings, USAA has grown into a highly competitive insurance and financial services provider, now a FORTUNE 500 member, offering insurance, banking, investment, and financial planning services to military personnel, veterans, and their families. USAA has become one of America’s leading insurance and financial service providers by remaining true to its founding values of service, loyalty, honesty, and integrity—the same core values that guide the U.S. military.

12. Founded by the military and for the military, USAA is intimately familiar with the lifestyle and special circumstances of military families. This specialized knowledge enables USAA to tailor its products and services to help its members meet their financial security needs. USAA’s employees and members share a strong, lifelong bond based on the military experiences and values that they have in common.

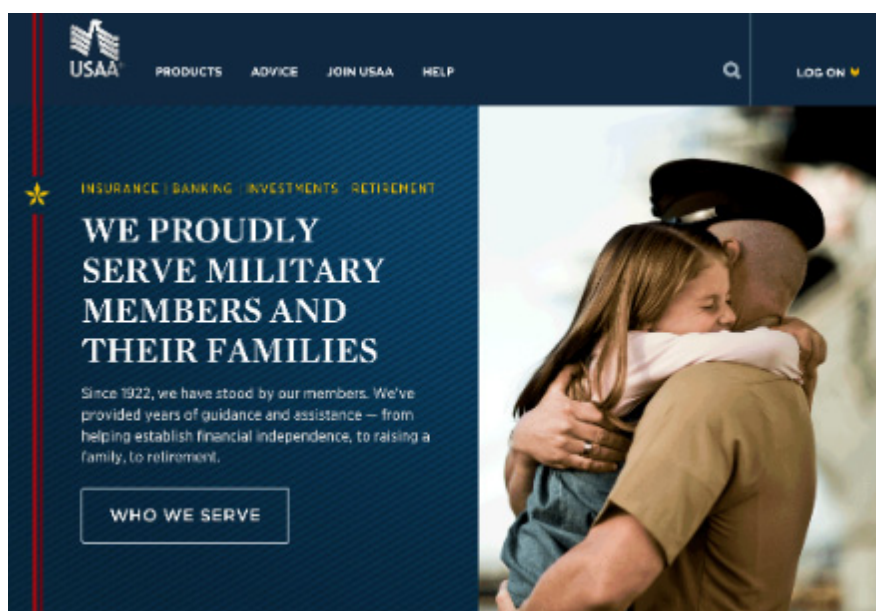
13. Today, USAA proudly provides for the financial well-being of over 11.9 million current and former members of the U.S. military and their families. One way it does so is through its VA-guaranteed home loan, which is provided by USAA Financial Services Bank (“USAA FSB”) throughout the country, and is highly regarded by consumers and the industry. USAA FSB is ranked fourth in the Department of Veterans Affairs’ list of the Top 300 “Lenders by Total Volume – All Loans” as a result of providing 38,624 home loans valued at over \$9.2 billion in FY 2016. MONEY Magazine named USAA FSB the “Best Bank for the Military” for 2016-17. IDC Financial Publishing Inc., a bank rating agency that rates the safety and soundness of financial

institutions, has awarded USAA FSB a Superior ranking (the highest of six possible rankings) for 128 consecutive quarters (or, for the last 32 years).

14. USAA holds its reputation in high regard, and is recognized repeatedly for its superior products and services, legendary commitment to its members, outstanding customer service, employee well-being, and financial strength. USAA has won numerous awards as a business and as an employer. In 2015, USAA received 85 major industry accolades. It has received the highest possible financial strength ratings from Standard & Poor's, A.M. Best, and Moody's. In 2016, USAA received a Best in Class ranking (a top-15 brand) among over 300 brands covered in Forrester's 2016 Customer Experience Index survey. FORTUNE Magazine has named USAA as one of the "World's Most Admired Companies" from 2014 – 2017. USAA also consistently receives high scores in J.D. Power and Associates' studies in the insurance and financial services fields. In addition, USAA was ranked first or second by BusinessWeek in its list of "Customer Service Champs" between 2007 and 2010. On Forrester Research Inc.'s "Customer Experience Index," USAA was top-ranked in "Bank, Credit Card and Insurance Categories Among All Brands Surveyed" in 2013 – 2016. The Temkin Group named USAA "No. 1 in insurance and credit card categories" in its Temkin Experience Ratings (2010 – 2016); "No. 1 in insurance and credit card categories" in its Temkin Trust Ratings (2013 – 2017); "No. 1 in bank, insurance and credit card categories" in its Temkin Forgiveness Ratings (2011 – 2016); and "No. 1 in bank, insurance and credit card categories" in its Temkin Customer Service Ratings (2013 – 2017). USAA also won Insure.com's "People's Choice Awards for Auto and Homeowners Insurance" in 2013 – 2014. The Ward Group has recognized USAA as one of the "50 Top Performing Insurance Companies" for the last 26 consecutive years, and as one of the "50 Top Performing Life/Health Insurance Companies" for the last 23 years. In recognition of

USAA's quality as an employer, USAA has received a top 50 ranking in FORTUNE's "100 Best Companies to Work For" for the last eight consecutive years, and was named first on Computerworld's "100 Best Places to Work in IT" in 2010, 2011, and 2012, and has appeared on the list for 16 consecutive years. USAA was also named on Latina Style's list of 50 best employers for Hispanic women in 2001 through 2016. In addition, USAA ranked first on G.I. Jobs Magazine's "Top 100 Military-Friendly Employers" in 2013 and 2014, and has been ranked in the list for the last eight years.

15. USAA conveys its commitment to serving U.S. military families with the superior products and services they deserve through national advertising campaigns that include print and digital advertisements and commercials broadcast over the Internet and television, such as those comprising USAA's "Mine Was Earned" and "Thank You" campaigns (together, the "USAA Campaigns"), and through USAA's use of many well-known trademarks, logos, service marks, and taglines. USAA's devotion to caring for our country's heroes, and its commitment to ensuring that these individuals are properly cared for, is a consistently prominent message, as can be seen on the homepage of USAA's website at [www.usaa.com](http://www.usaa.com):



**The USAA Tagline: “We Know What It Means To Serve”**

16. Since at least as early as 1999, USAA adopted and has used WE KNOW WHAT IT MEANS TO SERVE as a trademark, service mark, and tagline in connection with its insurance, financial, banking, investment, retirement, and mortgage services (hereinafter, the “USAA Tagline”).

17. The USAA Tagline is a reference to USAA’s founding members, and conveys the message that USAA’s longstanding military heritage uniquely positions USAA to provide the best quality products and services to military members and their families.

18. USAA has invested significant time, energy, and money in the advertising, promotion, and offering of its goods and services under the USAA Tagline, including VA-guaranteed home loan services. For nearly 20 years, the USAA Tagline has been featured prominently on USAA’s website, [www.usaa.com](http://www.usaa.com), in print and digital advertisements, in television commercials, in USAA’s annual member reports, and in other marketing material in connection with USAA’s products and services. Representative examples of USAA’s prominent use of the USAA Tagline are shown below:



"We Know What It Means To Serve" has long been USAA's signature.

It connects us—our shared experience, shared values and common military heritage.

It reflects our community of members—those who are serving, those who have served and their families.

It reflects the pride our employees take in the privilege of serving you.

19. USAA's products and services are very popular among U.S. military members and families, with USAA's membership exceeding 11.9 million members. USAA continues to invest substantial sums in promoting its products and services offered in connection with the USAA Tagline.



20. As a result, the USAA Tagline is widely recognized and exclusively associated by consumers, the public, and the trade as identifying the high quality products and services provided by USAA. The USAA Tagline represents a significant business investment and considerable good will of great value to USAA.

21. In addition to its longstanding common law rights in the USAA Tagline, USAA owns incontestable U.S. Trademark Registration No. 2,424,963 (the “’963 Registration”) for the USAA Tagline in connection with “[r]eal estate consultation; financial banking services; mortgage banking and lending services; credit card and debit card services; financial management services,” and other related services in Class 36, and “real estate and mortgage referral services for military personnel,” “automobile dealership referral services,” and other related services in Class 35. A true and correct copy of the ’963 Registration certificate is attached hereto as Exhibit 1.

22. USAA also owns incontestable U.S. Trademark Registration No. 2,424,968 (the ’968 Registration”) for the USAA Eagle logo design mark incorporating the USAA Tagline, which it has used since at least as early as 1999, in connection with the same services as those noted in the ’963 Registration.



A true and correct copy of the ’968 Registration certificate is attached hereto as Exhibit 2.

### **USAA Creates and Develops the USAA Campaigns**

23. Working with an advertising agency in and around the late Summer and early Fall of 2010, USAA created and developed an advertising campaign to align with USAA’s core messaging, which would be both unique and creative, and resonate with USAA’s target audience—current and former members of the U.S. military and their families.

24. In the initial stages of creation, it was decided that the campaign would feature different USAA members—veterans and/or their family members—holding up a photo of the veteran in his/her younger years, dressed in military uniform, to show how USAA membership and its privileges were “earned.” After nearly a year of creation and development, the “Mine Was Earned” campaign was born.

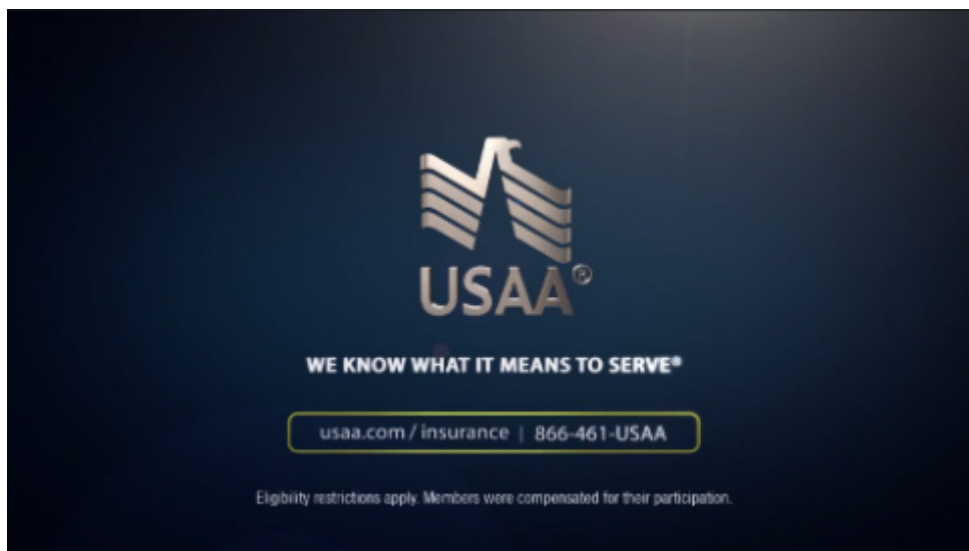
25. USAA launched its “Mine Was Earned” campaign in 2011 with two television commercials, “Mine Was Earned 1A” and “Mine Was Earned 1B,” featuring proud USAA members, depicted in a casual and serene daytime setting in or around their home, *e.g.*, in front of a house, on a porch, or in a yard, with their family-member veteran, who is shown holding up a photograph of his younger self in military uniform. The scenes are made even more personal by the display of the name of the veteran’s relative who has become a member of USAA by virtue of the veteran’s service in small white text, still examples of which are shown here:



26. In the background of these scenes is a male voiceover explaining the superior quality of USAA’s products and services and that “USAA’s commitment to serve the military, veterans, and their families, is without equal.” The male voiceover concludes by inviting the viewer to seek more information about USAA’s products and services and stating the USAA

<sup>2</sup> See “Mine Was Earned 1A,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5422131413001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5422131413001), at 0:23 and “Mine Was Earned 1B,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5422131412001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5422131412001) at 0:20.

Tagline, *i.e.*, WE KNOW WHAT IT MEANS TO SERVE, as the images of veterans and their families are followed by a closing screen that displays the USAA Tagline, as shown below:



27. USAA experienced an uptick in membership after the “Mine Was Earned 1A” and “Mine Was Earned 1B” commercials began airing in May and October 2011, respectively, on the Internet and national television, including in commercial spots for programs with millions of viewers, such as live NFL broadcasts. Due to this success, USAA created additional commercials to air as part of its “Mine Was Earned” campaign over the course of the next three years, including “Mine Was Earned 2A,” “Mine Was Earned 2B,” “Mine Was Earned 3,” and “Mine Was Earned 4.”<sup>3</sup>

28. USAA also created print and digital advertisements for its “Mine Was Earned” campaign that mirror the distinctive and creative concepts embodied in the television commercials,

---

<sup>3</sup> See “Mine Was Earned 2A,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5422134431001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5422134431001); “Mine Was Earned 2B,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5422109748001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5422109748001); “Mine Was Earned 3,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5422137366001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5422137366001); and “Mine Was Earned 4,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5423326403001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5423326403001).

including the depiction of proud USAA members, in a casual daytime setting in or around their home, holding up photographs, typically in black and white, of their veteran family member dressed in military uniform. Here too, the ads are made personal by the display of the name of the veteran's relative who has become a member of USAA by virtue of the veteran's service. Excerpts from copies of these advertisements are shown below:



Below is a special message from USAA.

**Only one kind of auto insurance is earned once, but may be handed down from generation to generation.**

[Get a Quote](#)

29. The print and digital advertisements comprising the “Mine Was Earned” campaign

<sup>4</sup> See “AFM AFSA P&C Legacy Direct Mail Ad” and “AFM WPAOG P&C Legacy Email Ad”; *see also* “AFM MOAA P&C Legacy Ad,” “AFM USNM P&C Legacy Direct Mail Ad,” and “AFM RMV P&C Legacy Email Ad.” Attached hereto as Exhibit 3 is a collection of true and correct copies of the foregoing USAA advertisements.

were first distributed nationwide via print publications, e-mail, and direct mailings since around December 2011.

30. In 2014, USAA created a new campaign titled “Thank You,” which is a continuation of the “Mine Was Earned” campaign, and features the same original and creative themes and images, as shown below:



31. USAA’s three “Thank You” commercials first aired on the Internet and national television in or around July 2014.

32. The USAA Campaigns have been viewed by tens of millions of people and are widely associated by consumers, the public, and the trade with USAA and USAA’s high-quality products and services.

33. A prior Creative Director at USAA’s advertising agency who supervised the development of the USAA Campaigns reported that, largely due to the USAA Campaigns, USAA’s brand awareness grew approximately 50% in a little over five years since 2011.

34. The USAA Campaigns and, in particular, their focus on and depictions of USAA members situated around their home, holding up photos of young family-member veterans in

---

<sup>5</sup> See “Thank You 1,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5423181541001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5423181541001), at 0:14 and “Thank You 4,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5423181152001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5423181152001), at 0:14. See also “Thank You 2,” available at [http://players.brightcove.net/2546882112001/default\\_default/index.html?videoId=5423208076001](http://players.brightcove.net/2546882112001/default_default/index.html?videoId=5423208076001).



uniform, have become so well-known and popular that third parties have used them to create parodies. For example, as part of the annual Army-Navy football game tradition, production company Doublebond Productions created a “spirit spot” video for the 2013 Army-Navy game titled “My N-Star Was Earned.” An “N-Star” is a gold star awarded to Varsity-letter athletes from the United States Naval Academy when they beat the United States Military Academy in certain sports competitions.

35. “My N-Star Was Earned” parodies the USAA Campaigns by copying their theme, setting, background, and style, and, in particular, by featuring a Navy student athlete, with his family, on the front steps of a home, holding a framed photograph of himself in a Navy athletic uniform, as shown below:



36. A male voiceover explains that Navy’s “superior level of athleticism rises high above that of its competitors” and that Navy’s “commitment to excellence in academics, athletics, and ourselves, is without equal.” The male voiceover concludes by saying “WE KNOW WHAT

---

<sup>6</sup> See “My N-Star was Earned – Army/Navy Spirit Spot 2013,” available at <https://www.youtube.com/watch?v=vykuqQRSvk0>, at 0:31.

IT MEANS TO WIN,” a play on the USAA Tagline, as the tagline appears on the final screen of the commercial:



### **USAA’s Copyright Registrations**

37. USAA is the exclusive copyright owner of the audiovisual works, and digital and print advertisements, comprising the USAA Campaigns.

38. USAA owns U.S. copyright registrations for the audiovisual works and print and digital advertisements comprising the USAA Campaigns.

39. On November 4, 2011, the U.S. Copyright Office issued a Certificate of Registration No. PA 1-756-464 for the first commercial in the USAA Campaigns, “Mine Was Earned 1A.”

40. In May 2017, the U.S. Copyright Office issued Certificates of Registration Nos. PA 2-030-469, PA 2-030-470, PA 2-041-092, PA 2-030-471, and PA 2-031-081 for USAA’s commercials “Mine Was Earned 1B,” “Mine Was Earned 2A,” “Mine Was Earned 2B,” “Mine Was Earned 3,” and “Mine Was Earned 4,” respectively.

41. On May 8, 2017, the U.S. Copyright Office issued Certificates of Registration Nos.

---

<sup>7</sup> See *id.* at 0:36.

PA 2-030-743, PA 2-031-079, and PA 2-031-051 for USAA's commercials "Thank You 1," "Thank You 2," and "Thank You 4," respectively.

42. On June 20, 2017, the U.S. Copyright Office issued Certificates of Registration Nos. VA 2-053-889, VA 2-053-893, VA 2-054-080, VA 2-053-877, and VA 2-054-078 for USAA's advertisements "AFM MOAA P&C Legacy Ad," "AFM USNM P&C Legacy Direct Mail Ad," "AFM WPAOG P&C Legacy Email Ad," "AFM RMV P&C Legacy Email Ad," and "AFM AFSA P&C Legacy Direct Mail Ad," respectively.

43. A collection of true and correct copies of the aforementioned U.S. Copyright Registration Certificates is attached hereto as Exhibit 4.

**NewDay USA's Misleading Business Practices and Poor Reputation**

44. NewDay USA is a nonbank mortgage lender striving to compete with USAA. Like USAA, NewDay USA boasts a military background and employs veterans, but its business practices fail to match USAA's high standards.

45. Since at least as early as 2013, NewDay USA's advertising and business practices have been criticized by state and federal regulators, the industry, and the public.

46. In 2013, the State Regulatory Registry LLC, which owns and operates the Nationwide Mortgage Licensing System & Registry, began investigating allegations that NewDay USA allowed its employees to cheat on mortgage originator license testing. 43 state mortgage regulators participated in negotiating a \$5.2 million administrative penalty for NewDay USA's conduct. The New York State Department of Financial Services charged NewDay USA with additional compliance failures, including the improper issuance of subprime home loans and misrepresentation of loan terms. NewDay USA was ordered to surrender its New York state mortgage banker's license.



47. In 2015, the Consumer Financial Protection Bureau publicly penalized NewDay USA for deceiving consumers about a veterans' organization's endorsement of NewDay USA products in advertising and for participating in a scheme to pay kickbacks for customer referrals.

48. Upon information and belief, NewDay USA's alleged dishonest business practices and public violations of state and federal regulations have tarnished NewDay USA's reputation in the marketplace.

### **NewDay USA Copies the USAA Campaigns**

49. Prior to 2013, NewDay USA had a reverse mortgage division and originated FHA and conventional forward mortgages, in addition to VA mortgages. According to a September 2013 NewDay USA press release, NewDay USA transitioned entirely out of the reverse mortgage market in 2013 and shifted its strategic focus to serving veterans and their families, as USAA has done for nearly a century.

50. On information and belief, in early- to mid-2013, years *after* USAA's "Mine Was Earned" campaign was conceived, created, developed, and first aired on national television, NewDay USA began developing an advertising campaign to promote its new focus on serving veterans and their families.

51. In or around November 2013, less than *one month* after USAA first aired its "Mine Was Earned 3" commercial on October 31, 2013, NewDay USA's advertising agency published on YouTube a NewDay USA commercial titled "That's Me."

52. "That's Me" is substantially, if not strikingly, similar to the commercials comprising the USAA Campaigns in many respects. It features U.S. military personnel as the central focus, depicted in a casual daytime setting in or around their home, *e.g.*, in front of a house, on a porch, or in a yard, bearing proud facial expressions, and holding photographs of their younger

selves in military uniform, sometimes in black and white, and framed within a simple picture frame. In fact, images just like the one below are featured *no less than seven times* in this 60-second NewDay USA commercial:



53. On information and belief, NewDay USA, with knowledge and intent, copied the USAA Campaigns. In addition to the “That’s Me” commercial, NewDay USA developed and publicly displayed on national television and on the Internet, at least seven additional commercials that are substantially similar to the USAA Campaigns.<sup>9</sup>

54. NewDay USA continues to broadcast one or more of these commercials on national television. On information and belief, one or more of these commercials have been and/or are broadcast within this district.

<sup>8</sup> See “That’s Me,” available at <https://www.youtube.com/watch?v=y0iOf0Hqk>, at 0:14.

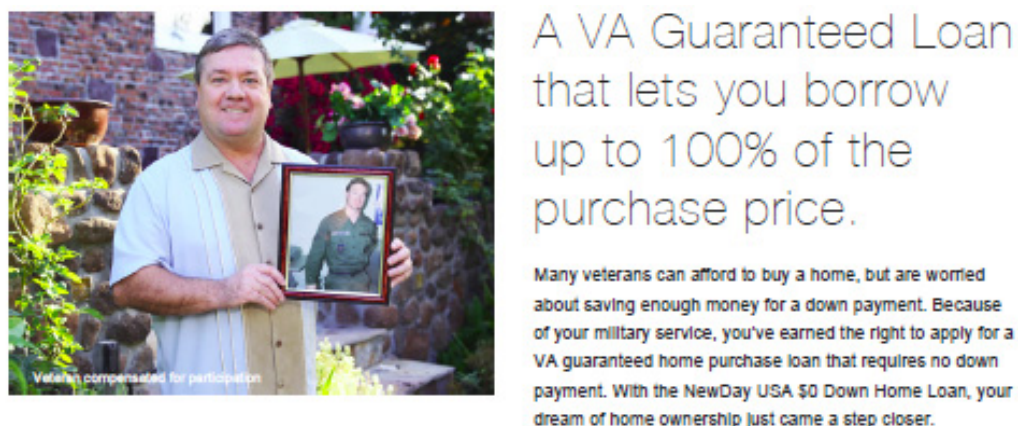
<sup>9</sup> The seven additional NewDay USA commercials include:

- “That’s Me Appraisal,” available at: <https://www.youtube.com/watch?v=A91TZ56AfF4>;
- “Veteran,” available at: <https://www.ispot.tv/ad/7x9j/new-day-usa-veteran>;
- “Veteran Refinancing,” available at: <https://www.ispot.tv/ad/7rz2/new-day-usa-veteran-refinancing>
- “One of Us,” available at: [https://www.ispot.tv/ad/Aom\\_/new-day-usa-one-of-us](https://www.ispot.tv/ad/Aom_/new-day-usa-one-of-us);
- “Respect,” available at: <https://www.ispot.tv/ad/AoRx/new-day-usa-financial-solution>;
- “Pictures,” available at: <https://www.ispot.tv/ad/AnBM/new-day-usa-pictures>; and
- A 2017 commercial, which aired as recently as June 2017 on The History Channel. See Exhibit 5, which is a collection of true and correct still shots of a video of the foregoing NewDay USA commercial.

55. NewDay USA also created testimonial videos using the portions of its commercials that were copied from the USAA Campaigns. These testimonial videos are displayed on NewDay USA’s public account on the video sharing website Vimeo.com and, on information and belief, were previously displayed on its website at [www.newdayusa.com](http://www.newdayusa.com) (the “NewDay Website”). Representative still images from the NewDay USA testimonial videos are shown below:



56. In addition, NewDay USA created still photographs of strikingly similar scenes for use in digital marketing material, just as USAA had done with its USAA Campaigns. These still photographs were displayed on the NewDay Website in connection with NewDay USA’s VA loan products and services, as shown in the following representative excerpts from the NewDay Website:

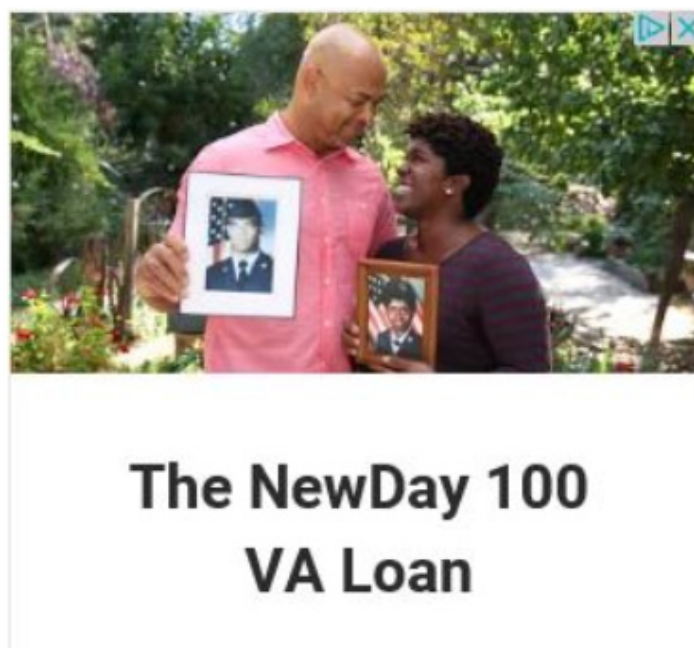


<sup>10</sup> See “2 Min Testimonial Copy 01 Vimeo,” available at <https://vimeo.com/135269172>, at 01:12 and “Veteran Vanessa S.,” available at <https://vimeo.com/133179302>, at 00:46.



11

57. NewDay USA also causes the display of similar still photographs on third party websites in the form of banner advertisements for NewDay USA's VA loan products and services. The following is a representative excerpt of such a banner advertisement taken from a page on the Priceline.com website, a true and correct screenshot of which is attached hereto as Exhibit 7:



<sup>11</sup> See Exhibit 6, which is a compilation of true and correct screenshots of the NewDay Website captured by the Internet Archive WayBack Machine.

58. The NewDay USA commercials, testimonial videos, and online marketing material described above are referred to herein as the “Infringing NewDay Campaign.”

59. The overall essence, theme, and mood of the parties’ campaigns are substantially, if not strikingly, similar, as a result of New Day USA’s copying. The theme of the parties’ campaigns centers on veterans, who are repeatedly depicted in serene settings, usually right outside of their home, such as on a stoop or patio, or in a yard, in the daytime. Veterans and their family members proudly hold up to the viewer photographs that display a younger version of himself or herself, or a veteran family member, in military uniform. The mood and message conveyed is a sense of pride and security: pride with serving our country, and the security provided by the advertiser’s financial services.

60. Not only are the theme, mood, and background similar between the parties’ campaigns, the individual pictorial images in the commercials and print and digital marketing material, are substantially, if not strikingly, similar, as a result of New Day USA’s copying of camera angles, framing, lighting, settings, and image editing. The following representative comparisons of still excerpts from the USAA Campaigns (top image) and the Infringing NewDay Campaign (bottom image) illustrate NewDay USA’s copying.

61. Both images shown below feature a male U.S. military member depicted in a shaded area outside a house, holding a photograph of his younger self in military uniform, in front of his chest, with his right hand at the bottom corner and his left hand at the top corner of the simple picture frame encasing the photograph. They bear proud facial expressions and look directly into the camera. The individual(s) are framed slightly off-center to the left in both images, and they are offset by a brick pillar on the right. Behind their shaded setting is a background of



foliage with subtle sunlight. The images are made personal by displaying the name of the veteran or the veteran's relative in small white text.

#### USAA



#### NewDay USA



62. The next two images feature a man and woman, centered almost perfectly in the image, but very slightly to the left. The male U.S. military member is dressed in a red shirt, and

<sup>12</sup> Compare "Mine Was Earned 1A" at 0:23 with "Respect" at 0:04.

is positioned on the left side of the image, the woman immediately on his right. They are surrounded by a background of lush, green foliage and look directly into the camera, with proud and happy expressions. Color photographs displaying the veterans in their younger years, in uniform, are held up to the camera.

#### USAA



#### NewDay USA



13

63. In both of the images below, veteran parents stand with their child, who is centered

<sup>13</sup> Compare “Thank You 4” at 0:21 with “One of Us” at 0:11 and “Respect” at 0:12.

between them, on a sunny day. The camera points directly at the family, at eye-level, and frames them in the center of the foreground of the image. A color photograph displaying a younger version of each veteran parent, dressed in military uniform, is shown directly to the viewer, male veteran on the left, female veteran on the right. All family members bear proud and happy expressions, which, along with the relaxed setting, deliver a sense of security and pride.

#### USAA



#### NewDay USA



14

64. Both of the following images appear to be set inside a home, during the daytime, and feature a single male who holds a black and white photograph of a younger man in military uniform, with each hand on an opposite corner of the simple brown picture frame encasing the

---

<sup>14</sup> Compare “Thank You 2” at 0:17 with Exhibit 6 (“NewDay 100 VA Loan”).



photograph. The camera frames the man slightly off-center, to the left, against a background of glass windows, which are predominantly visible on the right and provide a blurred glimpse into the greenery outside the house. Both images also display a blurred background consisting of two other framed photographs set side-by-side on a table or ledge to the right, in front of the windows. The men look directly into the camera with a relaxed and happy expression, conveying a sense of pride, and a sense of security, enabled by the services rendered to our country, as well as those received from each advertiser. The small white text displaying the men's names personalizes the image.

#### USAA



#### NewDay USA



<sup>15</sup> Compare Exhibit 3 with “One of Us” at 0:18, “Respect” at 0:17, and “Pictures” at 0:06.

65. The two images below feature females seated inside their homes. They are placed slightly off-center and at eye-level, and are framed by a background of white paned, glass windows, which provide soft, yet sunny, backlighting. The windows offer a blurred glimpse of the greenery outside. Both women hold a photograph of the veteran in uniform, simply framed, within their two hands, and look directly into the camera with a proud smile. Text displaying the name of each woman personalizes the image.

**USAA**



**NewDay USA**



66. All of the images above from the parties' commercials are followed by a closing screen with either the NewDay USA or USAA logo, website, and phone number, and conclude

<sup>16</sup> Compare Exhibit 3 with "Veteran Refinancing" at 0:12.

with a male voiceover that invites the viewer to seek more information about the advertised products and services.

67. The Infringing NewDay Campaign is so substantially similar to the USAA Campaigns that consumers may mistakenly believe that the parties' campaigns are the same. In fact, at least one consumer who viewed a NewDay USA commercial featuring the actress Jennifer Marshall mistakenly believed that he viewed a USAA commercial. In a comment to a photo posted on Ms. Marshall's Facebook profile, Facebook user Bob Clendenin stated: "Very nice job in the USAA spot. And I LOVE USAA." In response, Ms. Marshall, who has never appeared in a USAA commercial, clarified that the commercial, or "spot," was for a different advertiser, NewDay USA, and admitted that it was a "similar spot" to USAA's.



<sup>17</sup> See Exhibit 8, which is a true and correct screenshot from Facebook.

68. In a Zillow.com forum inquiring about references and ratings of NewDay USA, one viewer observed that “NewDay USA” has been “cloning [USAA’s] television ads.” As shown in the representative comments below, and in the screenshot from Zillow.com attached hereto as Exhibit 9, the large majority of posts in this forum contain complaints about NewDay USA and warned against doing business with them.



davidson don


Wonder when USAA, which is very reputable, will act to stop NewDay USA from cloning their TV ads.

March 27 2015  0 



zuser20141204082318080

Newday is a scam  
Run  
Cost more to do business with them

May 16 2016  1 



JennieWebster

I would like to thank everyone who posted their problems with New Day USA. My husband and I are almost ready to buy a house in a few months and the info everyone posted has saved us a lot of time and trouble! Thanks again

August 27 2014  2 



jlew3

I am glad I read these reviews prior to attempting to do business with New Day. These people appear to be a bunch of crooks ripping off veterans.

L Johnson  
Florida

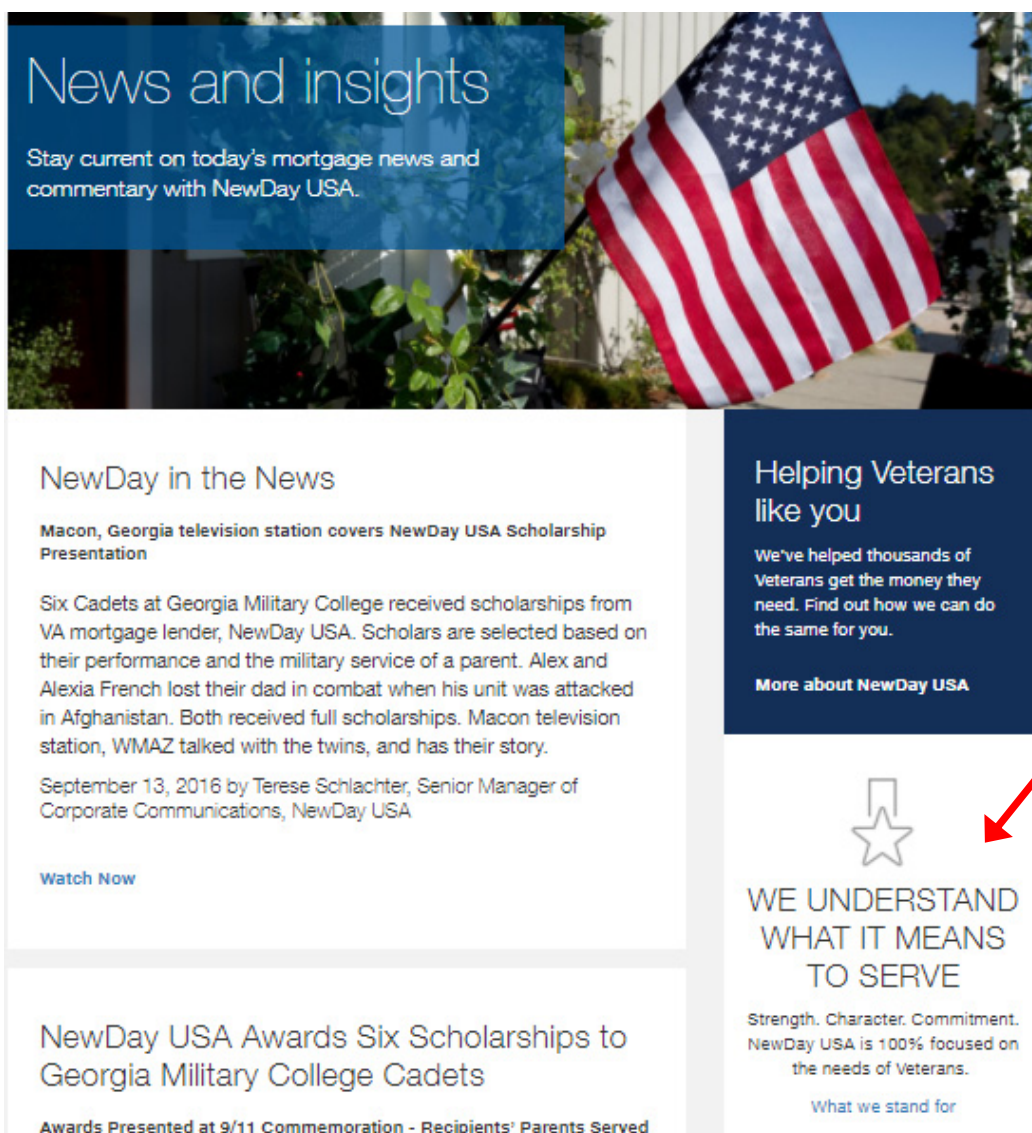
August 18 2014  6 



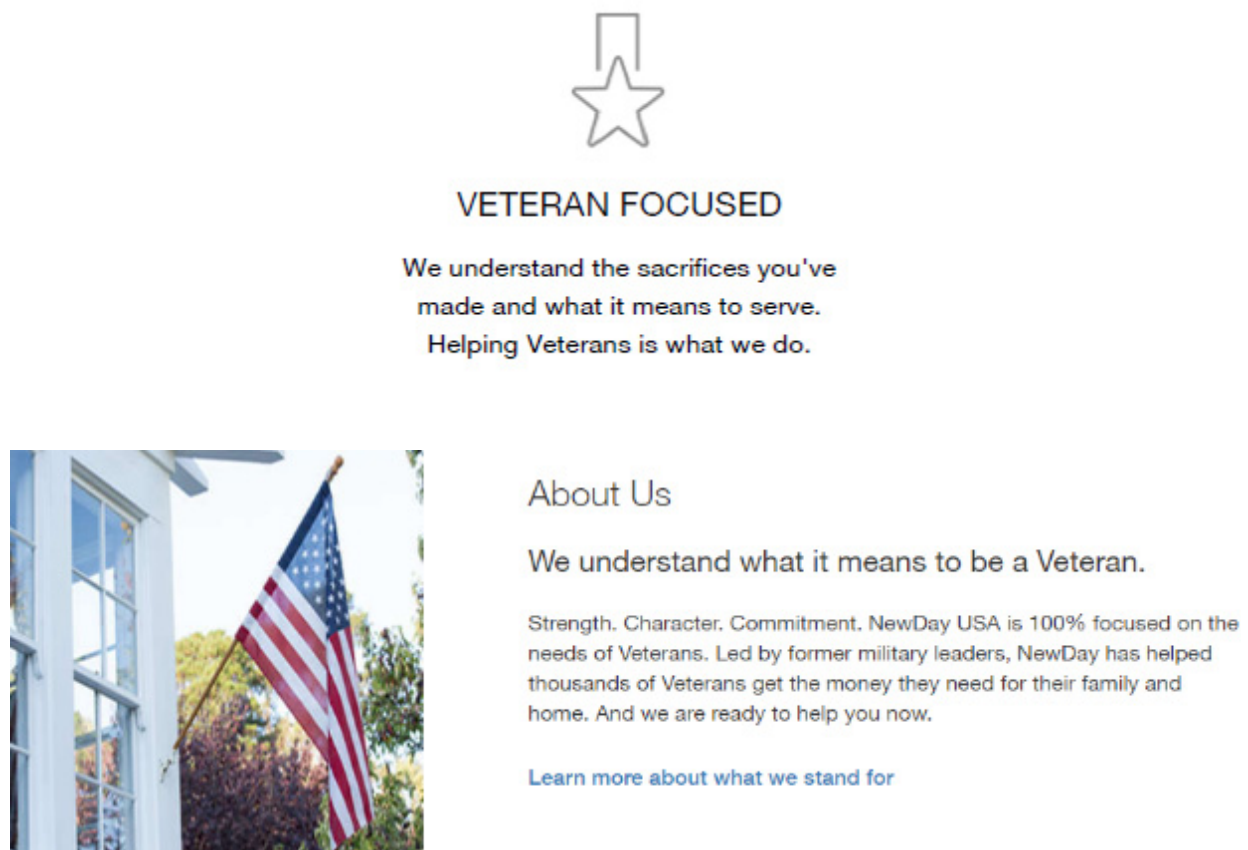
### NewDay USA Copies the USAA Tagline

69. In addition to mimicking the USAA Campaigns, NewDay USA has copied other aspects of USAA's well-known brand identity in an attempt to leverage the goodwill USAA has built within the veteran and military consumer base.

70. NewDay USA copied the USAA Tagline, WE KNOW WHAT IT MEANS TO SERVE, by adopting the virtually identical tagline, WE UNDERSTAND WHAT IT MEANS TO SERVE, as shown in the below excerpt of the NewDay Website, a true and correct copy of which is attached as Exhibit 10.



71. NewDay USA also adopted two additional taglines that convey USAA's ideals and messaging: "WE UNDERSTAND WHAT IT MEANS TO BE A VETERAN." and "WE UNDERSTAND THE SACRIFICES YOU'VE MADE AND WHAT IT MEANS TO SERVE." Below and attached hereto as Exhibit 11 are examples of these taglines currently displayed on nearly every webpage of the NewDay Website:



Together, the three aforementioned taglines adopted by NewDay USA are referred to as "the Infringing NewDay USA Taglines."

72. NewDay USA is actively using and promoting the Infringing NewDay USA Taglines in connection with its advertisement of VA-guaranteed home loan products and services.

73. Given the similarities between the parties' taglines and products and services, NewDay USA's use of the Infringing NewDay USA Taglines misleads consumers to believe that

there is a connection or association between NewDay USA's products and services and USAA's superior products and services.

74. Given NewDay USA's poor reputation and questionable business practices, the association that NewDay USA has created by emulating USAA's brand identity, including the USAA Campaigns and USAA Tagline, is likely to cause, and has caused, confusion in the market, which is harmful to consumers, USAA, and USAA's reputation.

**COUNT I**  
**Federal Copyright Infringement**  
**17 U.S.C. § 501**

75. USAA hereby restates and realleges the allegations set forth in paragraphs 1 through 74 above and incorporates them herein by reference.

76. Each of the commercials and print and digital advertisements in the USAA Campaigns consist of original and creative material that is copyrightable subject matter under the Copyright Act, 17 U.S.C. § 101 *et seq.*

77. USAA is the sole copyright owner of the commercials and print and digital advertisements in the USAA Campaigns.

78. USAA is the owner of U.S. Copyright Registration Nos. PA 1-756-464, PA 2-030-469, PA 2-030-470, PA 2-041-092, PA 2-030-471, PA 2-031-081, PA 2-030-743, PA 2-031-079, PA 2-031-051, VA 2-053-889, VA 2-053-893, VA 2-054-080, VA 2-053-877, and VA 2-054-078.

79. NewDay USA had access to the USAA Campaigns, which were aired on national television to tens of millions of viewers and shared publicly on the Internet.

80. NewDay USA copied the USAA Campaigns to create the Infringing NewDay Campaign that is substantially, if not strikingly, similar to the USAA Campaigns.

81. NewDay USA distributed and publicly displayed the Infringing NewDay Campaign.

82. NewDay USA knowingly and willfully copied and infringed the USAA Campaigns.

83. As a direct and proximate result of NewDay USA's direct copyright infringement, USAA has been damaged and will continue to be damaged.

84. NewDay USA's conduct has caused, is causing, and will continue to cause, USAA to suffer irreparable harm. Unless NewDay USA is restrained, USAA will continue to be so harmed, because there is no adequate remedy at law.

85. NewDay USA has realized unjust profits, gains, and advantages from its infringements.

86. In light of the foregoing, USAA is entitled to injunctive relief, and to the recovery of damages in an amount to be determined at trial.

**COUNT II**  
**Federal Trademark Infringement**  
**15 U.S.C. § 1114(a)**

87. USAA hereby restates and realleges the allegations set forth in paragraphs 1 through 86 above and incorporates them herein by reference.

88. As described above, USAA owns the distinctive USAA Tagline in connection with insurance, financial, banking, investment, retirement, and mortgage services.

89. The incontestable '963 and '968 Registrations embodying the registered USAA Tagline are in full force and effect, and USAA owns all right, title, and interest in them.

90. USAA's ownership and exclusive use in commerce of the USAA Tagline significantly predates the use by NewDay USA of the Infringing NewDay USA Taglines.



91. NewDay USA is using the Infringing NewDay USA Taglines in interstate commerce in connection with the sale, offering for sale, distribution, and/or advertising of VA-guaranteed home loan products and services, and competes directly with USAA in connection with such products and services.

92. NewDay USA's use of the Infringing NewDay USA Taglines is in total and willful disregard of USAA's trademark rights.

93. NewDay USA's use of the Infringing NewDay USA Taglines constitutes trademark infringement in violation of 15 U.S.C. § 1114, because such is without USAA's consent and is likely to cause confusion, mistake, and/or deception among consumers.

94. Upon information and belief, NewDay USA is and was at all relevant times both actually and constructively aware of USAA's prior use, ownership, and registration of the USAA Tagline, and NewDay USA's conduct is therefore willful and intended to confuse the public as to the source or affiliation of NewDay USA's products and services, and to injure USAA and reap the benefits of USAA's goodwill associated with the USAA Tagline.

95. As a direct and proximate result of NewDay USA's willful and unlawful conduct, USAA has been damaged and will continue to be damaged.

96. NewDay USA's conduct has caused, is causing, and will continue to cause, USAA to suffer irreparable harm. Unless NewDay USA is restrained, USAA will continue to be so harmed, because there is no adequate remedy at law.

97. NewDay USA has realized unjust profits, gains, and advantages from its trademark infringement.

98. In light of the foregoing, USAA is entitled to injunctive relief, and to the recovery of damages in an amount to be determined at trial.

**COUNT III**  
**Unfair Competition and False Designation of Origin**  
**15 U.S.C. § 1125(a)**

99. USAA hereby restates and realleges the allegations set forth in paragraphs 1 through 98 above and incorporates them herein by reference.

100. As described above, USAA owns the distinctive USAA Tagline in connection with insurance, financial, banking, investment, retirement, and mortgage services.

101. USAA's ownership and exclusive use in commerce of the USAA Tagline significantly predates the use by NewDay USA of the Infringing NewDay USA Taglines.

102. NewDay USA is using the Infringing NewDay USA Taglines in interstate commerce in connection with the sale, offering for sale, distribution, and/or advertising of VA-guaranteed home loan products and services, and competes directly with USAA in connection with such products and services.

103. NewDay USA's use of the Infringing NewDay USA Taglines is in total and willful disregard of USAA's trademark rights.

104. NewDay USA's use of the Infringing NewDay USA Taglines, as described above, constitutes false designation of origin in violation of 15 U.S.C. § 1125(a)(1)(A), because it is likely to cause confusion, to cause mistake, and/or to deceive as to the affiliation, connection, or association of NewDay USA with USAA and/or as to the origin, sponsorship, or approval by USAA of NewDay USA's goods, services, or commercial activity.

105. Upon information and belief, NewDay USA is and was at all relevant times both actually and constructively aware of USAA's prior use and ownership of the USAA Tagline, and NewDay USA's conduct is therefore willful and intended to confuse the public as to the source or

affiliation of NewDay USA's products and services, and to injure USAA and reap the benefits of USAA's goodwill associated with the USAA Tagline.

106. As a direct and proximate result of NewDay USA's willful and unlawful conduct, USAA has been damaged and will continue to be damaged.

107. NewDay USA's conduct has caused, is causing, and will continue to cause, USAA to suffer irreparable harm. Unless NewDay USA is restrained, USAA will continue to be so harmed, because there is no adequate remedy at law.

108. NewDay USA has realized unjust profits, gains, and advantages from its trademark infringement.

109. In light of the foregoing, USAA is entitled to injunctive relief, and to the recovery of damages in an amount to be determined at trial.

#### **COUNT IV** **Trademark Infringement under Texas Common Law**

110. USAA hereby restates and realleges the allegations set forth in paragraphs 1 through 109 above and incorporates them herein by reference.

111. As described above, USAA owns the distinctive USAA Tagline in connection with insurance, financial, banking, investment, retirement, and mortgage services.

112. USAA's ownership and exclusive use in commerce of the USAA Tagline significantly predates the use by NewDay USA of the Infringing NewDay USA Taglines.

113. NewDay USA is using the Infringing NewDay USA Taglines in interstate commerce, and in the State of Texas, in connection with the sale, offering for sale, distribution, and/or advertising of VA-guaranteed home loan products and services, and competes directly with USAA in connection with such products and services.

114. NewDay USA's use of the Infringing NewDay USA Taglines is in total and willful disregard of USAA's trademark rights.

115. NewDay USA's use of the Infringing NewDay USA Taglines, as described above, constitutes trademark infringement under Texas common law in that it is likely to cause confusion, to cause mistake, and/or to deceive as to the affiliation, connection, or association of NewDay USA with USAA and/or as to the origin, sponsorship, or approval by USAA of NewDay USA's goods, services, or commercial activity.

116. Upon information and belief, NewDay USA is and was at all relevant times both actually and constructively aware of USAA's prior use and ownership of the USAA Tagline, and NewDay USA's conduct is therefore willful and intended to confuse the public as to the source or affiliation of NewDay USA's products and services, and to injure USAA and reap the benefits of USAA's goodwill associated with the USAA Tagline.

117. As a direct and proximate result of NewDay USA's willful and unlawful conduct, USAA has been damaged and will continue to be damaged.

118. NewDay USA's conduct has caused, is causing, and will continue to cause, USAA to suffer irreparable harm. Unless NewDay USA is restrained, USAA will continue to be so harmed, because there is no adequate remedy at law.

119. NewDay USA has realized unjust profits, gains, and advantages from its trademark infringement.

120. In light of the foregoing, USAA is entitled to injunctive relief, and to the recovery of damages in an amount to be determined at trial.

### **PRAYER FOR RELIEF**

WHEREFORE, USAA respectfully prays that this Court enter judgment in its favor and against NewDay USA as follows:

A. An Order granting each of the claims for relief herein, in favor of USAA and against NewDay USA;

B. Entering judgment that NewDay USA's acts of copyright infringement, trademark infringement, and false designation of origin have been knowing and willful.

C. Permanently enjoining and restraining NewDay USA, its agents, servants, employees, officers, associates, attorneys, and all persons acting by, through, or in concert with any of them, from:

- i. copying or reproducing the USAA Campaigns, and displaying, distributing, using, and creating derivative works based on the USAA Campaigns;
- ii. using the USAA Tagline, and any confusingly similar designation, name, mark, slogan, phrase, or tagline, including the Infringing NewDay USA Taglines, as a trademark or service mark, or otherwise to market, advertise, promote, distribute, offer to sell, sell, or identify any business, products, or services in the United States;
- iii. engaging in any other act likely to induce the confusion or mistaken belief that NewDay USA or its business, products, services, or other commercial activities are in any way affiliated, connected, or associated with USAA; and
- iv. engaging in any other act which falsely represents or which has the effect of falsely representing that the goods and services of NewDay USA are licensed, authorized, offered, produced, or sponsored by USAA.

D. An Order awarding USAA its actual damages and NewDay USA's profits resulting from the infringement of USAA's copyrights, in an amount to be determined at trial, or, in the alternative, statutory damages;

E. An Order awarding USAA its actual damages and NewDay USA's profits resulting from the infringement of the USAA Tagline, in an amount to be determined at trial;

F. An Order granting recovery of USAA's attorneys' fees and costs;

G. An Order granting pre-judgment interest at the legally allowable rate on all amounts owed;

H. An accounting of all damages owed USAA; and

I. For such other and further relief as the Court deems just and proper.

## **DEMAND FOR JURY TRIAL**

Pursuant to Federal Rule of Civil Procedure 38, USAA hereby demands a trial by jury of all issues triable of right by a jury.

Dated: August 10, 2017

Respectfully submitted,

/s/ William T. Jacks

WILLIAM T. "TOMMY" JACKS

Texas Bar No. 10452000

[jacks@fr.com](mailto:jacks@fr.com)

**FISH & RICHARDSON P.C.**

111 Congress Avenue, Suite 810

Austin, TX 78701

Tel: 512-472-5070

MICHAEL T. ZOPPO (*pro hac* to be filed)

New York Bar No. 4292678

[zoppo@fr.com](mailto:zoppo@fr.com)

KRISTEN MCCALLION (*pro hac* to be filed)

New York Bar No. 4428470

[mccallion@fr.com](mailto:mccallion@fr.com)

VIVIAN C. CHENG (*pro hac* to be filed)

New York Bar No. 5318605

[cheng@fr.com](mailto:cheng@fr.com)

**FISH & RICHARDSON P.C.**

601 Lexington Avenue

New York, NY 10022

Tel: 212-765-5070

RICARDO BONILLA

Texas Bar. No. 24082704

[rbonilla@fr.com](mailto:rbonilla@fr.com)

**FISH & RICHARDSON P.C.**

1717 Main Street, Suite 5000

Dallas, TX 75201

Tel: 214-747-5070

**COUNSEL FOR PLAINTIFF, USAA**